

NLWJC - Kagan

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**Immigration - Affidavit of
Support Requirements**

Immigratic - affidavit of support



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Record Type: Record

To: Elena Kagan, Jose Cerda III, Leanne A. Shimabukuro
cc: Bruce N. Reed, Paul J. Weinstein Jr.
Subject: FYI

A heads-up:

The INS will announce on Monday the release of guidelines that for the first time requires sponsors of certain immigrants to meet minimum income requirements and for them to be financially responsible for immigrants that they sponsor. An immigrant's sponsor will be required to demonstrate an income level of at least 125% of the poverty level. The mechanism for establishing this will be a new legally-binding affidavit of support that will be effective December 19, 1997. This new requirement is mandated by the 1996 Immigration bill.

As background you should know that the Administration supported making the sponsorship requirement legally binding. Also, we worked during the negotiations of the legislation to reduce the income level required for sponsorship to 125% from much higher levels that would have created significant barriers to legal immigration for family reunification. (Even now, I believe that INS has internal statistics showing the 125% threshold will have a sizable and disproportionate impact on the ability of U.S. citizen families from Mexico to sponsor their relatives for legal immigration.)

The usual preparations for roll-out are proceeding with briefings scheduled, press conference and statement, etc.

Note to Bruce -
you should answer
in meeting.

Immigratic - Affidavit of
Support regulation

Elena,

INS is currently undergoing a rulemaking to develop regulations to implement Affidavit of Support requirements. As far as I am aware, this rulemaking is the first matter facing the Administration since the Printz (Brady Law) decision that requires assessment of the case's effect on ongoing federal regulatory programs. After prodding from DOJ, INS, as the attached memo attests, is attempting to construe the underlying statute to avoid Printz concerns. Whether that construction will avoid adverse Hill reaction (or a legal challenge) is another question.

Anyway, I thought you might want to be aware of the matter both because of the nature of the specific rulemaking at issue and because of the implications that this matter may have for other federal programs.

Thanks.

Bc

Diana -

You're more up on these issues than I am. Could you look this over and tell me what you think? Note especially my question on p. 3 - what should we think of an administrative interpretation that ~~makes~~ gives states + fed agencies the choice of whether to proceed against a sponsor for reimbursement of benefits?

Elena

cc: Bruce

Memorandum



HQCOU 120/17.3 -C

Subject:	Date:
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To: Seth Waxman, Acting Deputy Attorney General and Sally Katzen, Administrator Office of Information and Regulatory Affairs, OMB

From: Office of the Commissioner

DRAFT

Since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Immigration and Naturalization Service has been working closely with the Office of Management and Budget, other components of the Department of Justice, and other Federal Agencies to develop a new enforceable Affidavit of Support and a regulation to implement it. The resolution of many difficult legal and policy issues needed to be coordinated among these agencies, and by the end of June the new affidavit of support form and regulation were approved by OMB. Cleared

However, on June 27, 1997, the Supreme Court decided Printz v. United States, a landmark decision invalidating the portions of the Brady Handgun Control Act which required State and local law enforcement officials to conduct background checks on persons purchasing handguns. In Printz the Court held that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." This decision has required a reassessment of the affidavit of support regulation because of the effect on States of provisions relating to the definition of "means-tested public benefits" and the enforcement of the affidavit.

Based on our assessment of the Printz case and the relevant legal and policy issues, the INS has determined that the approach outlined in this memorandum would be the best course for the INS to follow in implementing the affidavit of support.

This memorandum sets forth INS policy preferences on three issues. First, how should the affidavit of support address the definition of "Federal means-tested public benefit?" Second, how should the affidavit of support address the definition of "State means-tested public benefits?" Third, how should INS interpret the reimbursement provisions of section 213A(b)(1)(A) of the Immigration and Nationality Act in light of the Printz case? The memorandum also requests advice from the Office of Legal Counsel on the constitutional questions surrounding these determinations.]

In arriving at the decisions outlined in this memorandum, the INS has attempted to balance four important considerations: 1) the need for a definition of "means-tested public benefit" that reflects determinations by Federal and State agencies concerning which of their programs are means-tested; 2) the need to provide aliens and sponsors with adequate notice of which benefits will cause a sponsor to be liable for reimbursement if an alien receives them; 3) the need to implement the affidavit of support in a way that respects States' rights and avoids creating serious questions about the constitutionality of the affidavit of support statute and regulation; and 4) the need to implement an affidavit of support that is enforceable to the extent permitted by law.

FEDERAL MEANS-TEST PUBLIC BENEFITS

The regulation will define a "Federal means-tested public benefit" as any public benefit funded in whole or in part with Federal funds that is defined as a "means-tested public benefit" by the Federal agency implementing the Federal funds. The regulation will also state that no benefit described in sections 401(b), 411(b), 422(b), or 423(d) of Public Law 104-193 (Welfare Reform) may be considered a "means-tested public benefit." These sections identify, respectively, which benefits are exempt from the general prohibition on the receipt of benefits by non-qualified aliens, which benefits are exempt from State deeming, and which benefits are not subject to reimbursement under the affidavit of support. The regulation will make specific reference to any definition of "Federal means-tested public benefit" published by a Federal agency at the time the regulation is issued. The INS assumes that the Department of Health and Human Services will publish such a definition in some form prior to or simultaneous with the publication of the affidavit of support regulation. The INS will also list in an attachment to the affidavit of support (Form I-864) any Federal programs which have been identified by the benefit agencies as being "Federal means-tested public benefits."

This policy both permits Federal benefit agencies to define which benefits are "means-tested public benefits" and gives sponsors and aliens adequate notice of what kinds of programs will give rise to a sponsor's obligation to reimburse a Federal agency. It also helps to ensure that the affidavit of support will be fully enforceable with respect to Federal benefits.

STATE MEANS-TESTED PUBLIC BENEFITS

The regulation will define "State means-tested public benefit" as any public benefit for which no Federal funds are provided that a State, State agency, or political subdivision of a State defines as a "means-tested public benefit." The regulation will again state that no benefit described in sections 401(b), 411(b), 422(b), or 423(d) of Public Law 104-193 may be considered a "means-tested public benefit." The regulation will also contain language indicating that States *should* publish notice of what benefits they consider to be "means-tested public benefits" as soon as possible and preferably prior to the date that the law requires the affidavit of support to be filed with immigrant visa and adjustment of status applications.

This policy maximizes State participation and autonomy in the process of determining which benefits are "means-tested" and minimizes the chance that the regulation will be challenged as an unconstitutional requirement that States take action to implement a federal program. It also

encourages States to provide sponsors and aliens with proper notice and allows States to fully enforce the reimbursement provisions of the new law.

THE REIMBURSEMENT PROVISIONS AND THE PRINTZ CASE

In light of the Printz case, a potential constitutional conflict arises because of the language in section 213A(b)(1)(A), which reads:

[u]pon notification that a sponsored alien has received any means-tested public benefit, the appropriate nongovernmental entity which provided such benefit or the appropriate entity of the Federal Government, a State, or any political subdivision of a State shall request reimbursement by the sponsor in an amount which is equal to the unreimbursed costs such benefit. (Emphasis added.)

If read literally and in isolation, this subparagraph appears to require Federal agencies, State agencies, and nongovernmental entities to request reimbursement for all means-tested public benefits given to aliens who have sponsors that signed an affidavit of support. Read in this way, section 213A(b)(1)(A) could well be held unconstitutional under the holding in Printz because it commands State officials to take specific action in what could be considered the control of immigration, a Federal program.

Operating under the general principle that statutes should be construed to avoid serious constitutional problems, the INS would prefer to interpret section 213A(b)(1)(A) as requiring only that reimbursement be requested as a precondition to an agency bringing legal action against the sponsor under section 213A(b)(2). Section 213A(b)(1)(A) would thus be read not to create a requirement that Federal, State and nongovernmental entities request reimbursement in all cases where an alien receives a means-tested public benefit.

This interpretation makes the statute far less vulnerable to constitutional challenge than a literal reading of the statute, which would view it as creating an obligation that States request reimbursement in all cases. States are unlikely to challenge an interpretation of the statute that gives them the power to determine whether or not to request reimbursement, and they would be unlikely to win any such challenge. This reading increases State authority and makes the affidavit more enforceable because its enforcement will be less vulnerable to challenge in the courts.

EFFORTS TO ENSURE STATE ENFORCEMENT

Because the above policies are designed to maximize State authority and to avoid potentially serious constitutional challenges to the affidavit of support regulation, they do not require States to provide public notice of a definition of "State means-tested public benefits" nor to request reimbursement in all cases. To help guarantee full enforcement of the affidavit of support and ensure that sponsors receive adequate notice, the INS will undertake an aggressive public education campaign to inform States of their responsibilities and mobilize them to publish notice of benefits considered to be "means-tested" and aggressively enforce the affidavits of support.

makes reimbursement actual optional, for states and feds. OK?

REQUEST FOR LEGAL ADVICE

The INS requests that the Office of the Legal Counsel advise the INS in writing regarding the following questions: 1) do the policies outlined in this memorandum raise any significant constitutional concerns? 2) would a policy interpreting INA section 213A(b)(1)(A) as requiring State, Federal and nongovernmental agencies to request reimbursement in all cases in which they are informed that an alien has received a means-tested public benefit raise significant constitutional concerns? 3) would a policy of making enforcement of the affidavit of support contingent on a State having issued public notice prior the date an affidavit is filed raise significant constitutional concerns?

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I look forward to further discussion of the issues with you.

DRAFT

Doris Meissner
Commissioner